

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000536-001 DT

03/13/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

KENT C KEARNEY

v.

VICKI LYNN DARNELL (001)

DAVID G DERICKSON

PHX MUNICIPAL CT

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 13430864.

Defendant-Appellant Vicki Lynn Darnell (Defendant) was convicted in Phoenix Municipal Court of failure to yield right-of-way at a crosswalk, and causing serious physical injury by moving violation. Defendant contends the statute allows the imposition of criminal liability without the requirement of finding all elements beyond a reasonable doubt, and contends the trial court did not find all the elements of the criminal offense beyond a reasonable doubt. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

Defendant was charged with failure to yield right-of-way at a crosswalk, A.R.S. § 28-792 (civil violation); and causing serious physical injury or death by moving violation, A.R.S. § 28-672 (criminal violation). Prior to trial, Defendant's attorney did not file any motion to dismiss contending A.R.S. § 28-672 was unconstitutional.

At the trial in this matter, Robin Rice testified she was in the crosswalk on January 9, 2011, when she was hit by a vehicle. (R.T. of Nov. 3, 2011, at 3-4.) At that time, she had the "walk" sign. (*Id.* at 14-15, 17.) As a result of the injuries she received, she was no longer able to walk and had to use a wheelchair. (*Id.* at 5-6, 11.) Her hips were also fractured. (*Id.* at 6-7.)

Other witnesses testified about the collision that occurred on January 9, 2011. Chad Raliga testified he was in the area of 26th Street and Roosevelt Street at about 6:50 p.m. when he saw a woman crossing the street in the crosswalk, and then saw a car hit the woman while she was in the crosswalk. (R.T. of Nov. 3, 2011, at 75-76.) Emiliano Nava testified he did not see the collision, but he heard the impact. (*Id.* at 19, 21.) He saw a woman lying in the street, a boy lying on one side, and a car stopped with a baby carriage "underneath the car." (*Id.* at 19-20.) Corina Albarran testified she was driving east on Roosevelt Street at about 6:50 p.m. and did not see the collision, but she saw a woman lying in the street. (*Id.* at 23-24, 26.) Katherine Schleiefer testified she did not see the collision, but she heard the impact. (*Id.* at 93-94.) She had no idea where the pedestrian was when the car hit her. (*Id.* at 130-31.)

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Detective Glen Orsted testified he was called to the location of 26th Street and Roosevelt Street to investigate a traffic collision. (R.T. of Nov. 3, 2011, at 28.) Based on his investigation, he determined a silver Lexus had collided with a pedestrian and a baby stroller. (*Id.* at 29, 32.) He further determined the pedestrian and the baby stroller were within the crosswalk at the time of impact. (*Id.* at 36–38, 48–49, 54.) The posted speed limit was 35 miles per hour, and he determined the Lexus was moving at a minimum of 32 miles per hour. (*Id.* at 40.)

Detective David Schwartz testified he was called to the location of 26th Street and Roosevelt Street to investigate a traffic collision. (R.T. of Nov. 3, 2011, at 56–57.) He saw a Lexus with front-end damage consistent with a pedestrian collision and determined Defendant was the driver of that vehicle. (*Id.* at 57–58.) Defendant said she did not see a pedestrian, but she did see the baby stroller just prior to impact. (*Id.* at 58–59.)

Detective Chris Loeffler testified he was called to the location of 26th Street and Roosevelt Street on January 9, 2011, to investigate a traffic collision. (R.T. of Nov. 3, 2011, at 81.) As a result of his investigation, he cited Defendant for failure to yield right-of-way at a crosswalk and causing serious physical injury by moving violation. (*Id.* at 82.)

Officer Alex Clinton testified he responded to a traffic collision at 26th Street and Roosevelt Street on January 9, 2011. (R.T. of Nov. 3, 2011, at 63.) He identified photographs of the location showing the crosswalk warning signs and the crosswalk markings. (*Id.* at 68.)

After presenting these witnesses, the State rested. (R.T. of Nov. 3, 2011, at 132.) Defendant's attorney did not make a motion for judgment of acquittal. (*Id.* at 132–33.)

Defendant then testified she did strike a stroller, but contended the stroller was not in the crosswalk when she hit it. (R.T. of Nov. 3, 2011, at 133, 141–42, 148–49.) She said she never saw a woman. (*Id.* at 142, 149.) After Defendant testified, the defense rested. (*Id.* at 169.)

The prosecutor waived his opening final argument. (R.T. of Nov. 3, 2011, at 169.) In his final argument, Defendant's attorney contended the victim suddenly left the curb and ran in front of Defendant's vehicle. (*Id.* at 170–75.) In his closing final argument, the prosecutor first argued Defendant had inflicted a serious physical injury on the victim. (*Id.* at 175.) He next argued Defendant failed to yield to a pedestrian in a crosswalk. (*Id.* at 175–76.) He thus concluded by arguing that, because (1) the victim was in the crosswalk, (2) Defendant did not yield to her, and (3) the collision caused serious injury to the victim, the trial court should find Defendant guilty. The trial court ruled as follows, and found Defendant guilty of the criminal charge and responsible for the civil charge:

THE COURT: . . . Okay. All right. Well, in these kinds of cases, I always start by reviewing the statutes that are involved and—and to me, it's a two-step process. The first is to determine whether or not the State has proved the civil charge of violating 28–792A, which is the—the right-of-way at a crosswalk, and so I re-read that. And of course, the—the standard for that is preponderance of the evidence on the civil charge. So, in that regard, let me first say with regards to the evidence, the significant evidence, of course is whether or not—one of the significant, I should say—is whether or not Ms. Rice was in the crosswalk.

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The testimony that I have to consider that she was[,] was her own testimony that she was in the crosswalk. And then the—since there was no other witness that saw the actual impact, then what is important to me, was the reconstruction done by the officers and in particular, Detective Ors—I think it's Orsted, as I'm reading my notes correctly—he's the one that reviewed all of the physical evidence out at the scene and from my notes, he indicated, all indications, including the evidence found, the interviews, indicate that she was in the crosswalk at the time that she was hit.

Now, of course, the second, sort of the end of the statute, 792A, is that—well, I should back up just a second. That the driver approaching a crosswalk would need to yield, “. . . to a pedestrian crossing the roadway within a crosswalk when the pedestrian is on the half of the roadway on which the vehicle is traveling.”

Based upon all the evidence, doesn't appear that there's any doubt that she was already over on that side, the south side. So, three-fourths of the way across the crosswalk, or across Roosevelt when she was hit.

Now, the last sentence about a pedestrian also, obviously, has some responsibility not to run out; not to leave a place of safety. She's already crossed. The only—there's no evidence at all, there's a lot of questions, there's no evidence at all that she was running. The closest evidence that there is to that is Miss Schleiefer—I'm probably mispronouncing that—testimony that when she parked and looked across the street, she saw the victim hunched over, pushing the stroller. Course, she looked to me from—to be a rather small person, and she's pushing two babies in a rather large stroller and she hurriedly—in a hurried pace. She didn't say she was running. And that's the last that she saw of her.

So, it would be speculation on my part to—to attribute to Ms. Rice that she was running through the crosswalk, or running across the street and somewhere other than the crosswalk.

And Miss Schleiefer's testimony in particular—obviously, she's Miss Darnell's co-employee—was, by her own words, guessing and greatly estimating thing—distances that she's not—she didn't even—I—at least it appeared to me, not comfortable doing that, but she was asked repeatedly to do so. So, she did. And they all—all of her thoughts about where the victim was are based on her own thoughts and are totally contradicted by the professionals who do the reconstruction. That was a—seemed to be a pretty detailed reconstruction in this particular case.

Now, so, being preponderance of the evidence, I—I'd say that even if it were beyond a reasonable doubt, that the State has met its burden in that regard.

Now, then we go to the 28-672, which is what criminalizes—not my favorite statute, I should add—but it criminalizes behavior because I don't think, at least from my perspective from what I heard, there's anybody here that says Miss Darnell was aiming and intended to hit this person.

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But, 692—672, I should say, then reads the person is guilty of causing serious—of—of violating the statute if they cause “serious physical injury or death by a moving violation.” If the person violates, and then lists this particular statute. So, it’s included. And based upon the—the evidence presented, the Court finds that the—the injuries, the broken pelvis, the fractures—based upon not only what Ms. Rice said, but I believe it was one of the other detectives who checked at the hospital as to what the results were of the injuries, and I think Miss Darnell herself recognizes that the injuries were serious; that they were caused by the violation here. So, I do find her guilty.

You wish to proceed to sentence today or do you want to set if [*sic*] off?

MR. TORREY: Your Honor, I—I actually have to respectfully object, for lack of a better term. The legal standard for this has to be beyond a reasonable doubt for all elements of the offense. Even though two of those elements come from a civil traffic standard.

THE COURT: Well, I—I specifically separated out first the civil. It’s charged as a civil charge. It is then included, I understand, in 672. And having the—the next step then, would be to say, yes, beyond a reasonable doubt, the State has proved that there was a civil violation of that charge.

MR. TORREY: Your Honor, in order to attach criminal liability, all the elements of the offense must be proven beyond a reasonable doubt.

THE COURT: Well, as I—and I’m saying that that’s what happened. I agree with that. And that I’m finding that the State has proved the case. That’s why I specifically said that even if it wasn’t as to the civil charge, preponderance of the evidence, the State’s met its burden of proving it beyond a reasonable doubt.

But—but, I understand your point that—that the—the legislature has chosen to criminalize behavior that might otherwise be simply considered negligent. Not my decision. I’m just simply following the law.

MR. TORREY: Your Honor, I just need to make sure that the record was clear for the—the appeal on that.

THE COURT: I understand.

MR. TORREY: That’s all.

THE COURT: I understand. All right. So, was that sufficiently clear? I mean, obviously the State’s going to have to deal with it—with it. So, I want to make sure everybody understands what my ruling was.

MR. HUTCHISON: Yes, Judge.

THE COURT: All right.

(R.T. of Nov. 3, 2011, at 178–83.) The trial court then set sentencing for December 15, 2011, and later continued it to January 26, 2012. (R.T. of Dec. 15, 2011, at 195.)

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On December 6, 2011, Ian Neale and Jennifer Boldi filed a Notice of Appearance and Substitution of Counsel stating they were now representing Defendant. On December 14, 2011, David Derickson filed a Notice of Association of Counsel stating he was associated with Mr. Neale and Ms. Boldi in representing Defendant. On December 15, 2011, Mr. Derickson filed a Motion To Strike/Void Criminal Enhancement Portions of A.R.S. § 28–672, and on December 29, 2011, filed a [Supplemental] Motion To Strike/Void Criminal Enhancement Portions of A.R.S. § 28–672. On January 12, 2013, the State filed an Opposition. On January 20, 2012, the trial court denied Defendant’s Motion To Strike/Void Criminal Enhancement Portions as untimely.

The trial court subsequently imposed sentence. (R.T. of Jan. 26, 2012, at 213–15.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. Did Defendant’s attorney make his objection in a timely manner.

Defendant contends A.R.S. § 28–672 is unconstitutional because it allows the imposition of criminal liability without the requirement of finding all elements beyond a reasonable doubt. Rule 16.1(b) of the Arizona Rules of Criminal Procedure provides a party is required to make all motions not later than 20 days prior to trial, and Rule 16.1(c) provides any claim not so raised is precluded. In the present matter, Defendant’s attorney did not make any claim about the constitutionality of A.R.S. § 28–672 prior to trial, thus Defendant is precluded on that claim unless Defendant can establish fundamental error. Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant’s case, error that takes from the defendant a right essential to the defendant’s defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). As discussed below, this Court concludes Defendant has failed to show error, much less fundamental error.

B. Is A.R.S. § 28–672 unconstitutional.

Defendant contends A.R.S. § 28–672 is unconstitutional because it allows the imposition of criminal liability without the requirement of finding all elements beyond a reasonable doubt. As Defendant correctly notes, the United States Constitution requires proof of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361–62 (1970). This Court concludes, however, A.R.S. § 28–672 requires the State to prove all the elements of the offense beyond a reasonable doubt, thus it is constitutional.

The starting point is the civil statute, which in this case essentially provided as follows:

[T]he driver of a vehicle shall yield the right-of-way . . . to a pedestrian crossing the roadway within a crosswalk

A.R.S. § 28–792(A). That statute is incorporated into the criminal statute, which for this case provided as follows:

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A person is guilty of causing serious physical injury or death by a moving violation if the person violates any one of the following and the violation results in an accident causing serious physical injury or death to another person: . . . (6) Section 28–792.

A.R.S. § 28–672(A)(6). Because that statute provides a person is guilty if the person violates one of the listed statutes and that conduct causes serious physical, A.R.S. § 28–672(A) incorporates the elements of the listed statute into A.R.S. § 28–672(A) itself. For the charge in this case, it is as though the statute read as follows:

A person is guilty of causing serious physical injury or death by a moving violation if the person fails to yield the right-of-way to a pedestrian crossing the roadway within a crosswalk, and that conduct results in an accident causing serious physical injury or death to that pedestrian.

Thus, in order to prove a defendant guilty of A.R.S. § 28–672(A) for the statute involved here, the State had to prove the following elements: (1) the victim was a pedestrian crossing the roadway within a crosswalk; (2) Defendant failed to yield the right-of-way to the victim; (3) that conduct resulted in a collision; (4) that collision caused serious physical injury to the victim. Because these were then elements, the State had to prove each of them beyond a reasonable doubt. Because the State had to prove all the elements beyond a reasonable doubt, the statute was therefore constitutional.

Defendant contends, however, all the state had to prove beyond a reasonable doubt was (1) Defendant had been found responsible for a violation of A.R.S. § 28–792, and (2) that violation resulted in an accident causing serious physical injury to the victim. In order for A.R.S. § 28–672(A) to operate in that fashion, it would have to read as follows:

A person is guilty of causing serious physical injury or death by a moving violation if the person *has violated* any one of the following and the violation results in an accident causing serious physical injury or death to another person: . . . (6) Section 28–792.

(Emphasis added.) That is not the language contained in the statute, and because the statute contains different language, the language of the statute as written does not support Defendant’s argument.

C. Did the trial court find all the elements of A.R.S. § 28–672 beyond a reasonable doubt.

Defendant contends the trial court did not find all the elements of A.R.S. § 28–672 beyond a reasonable doubt. The record does not support Defendant’s contention. The trial court first addressed whether the State had proved the elements of failure to yield right-of-way at a crosswalk, A.R.S. § 28–792, which was a civil violation, and as such the trial court noted the State had to prove those elements by a preponderance of the evidence. (R.T. of Nov. 3, 2011, at 178.) The trial court went on to find the State had proved those elements not only by a preponderance of the evidence, the State had proved them beyond a reasonable doubt:

Now, so, being preponderance of the evidence, I—I’d say that even if it were beyond a reasonable doubt, that the State has met its burden in that regard.

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(R.T. of Nov. 3, 2011, at 181.) The trial court then stated the elements of § 28–792 were included within the elements of § 28–672. (*Id.* at 181.) A trial judge is presumed to know the law and to apply it in making decisions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶ 49 (2004). This Court must therefore presume the trial court knew the State had to prove all the elements of the criminal offense beyond a reasonable doubt and that the trial court applied that law in making its finding that Defendant was guilty of A.R.S. § 28–672. Moreover, this Court does not need to engage in that presumption because the trial court essentially stated on the record it found all the elements beyond a reasonable doubt. The trial court therefore correctly found the State had proved all the elements of A.R.S. § 28–672 beyond a reasonable doubt.

III. CONCLUSION.

Based on the foregoing, this Court concludes (1) Defendant has failed to establish any error, let alone fundamental error, (2) A.R.S. § 28–672 is constitutional in that it requires the State to prove all the elements of the offense beyond a reasonable doubt, and (3) the trial court correctly found the State had proved all the elements of A.R.S. § 28–672 beyond a reasonable doubt.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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